No. 9204

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit 9

COUNTY OF FRESNO and G. P. CUMMINGS, Assessor of the County of Fresno, State of California,

Appellants,

vs.

COMMODITY CREDIT CORPORATION,

Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Northern Division.

REPLY BRIEF FOR APPELLANTS.

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FOREWORD.

Appellee has not, in its reply brief, made any attempt to answer two of the arguments which we presented in our opening brief. At pages 45 to 54, inclusive, we presented the argument that "the Commodity Credit Corporation has no property in the cotton taxed by the appellants," and at pages 54 to 62, inclusive, we presented the argument that "none of the cotton pledged to the Commodity Credit Corporation and taxed by the appellants herein belonged to the United States." We have been unable to find any

answer to these contentions in appellee's reply brief, and therefore we feel that we are justified in saying that the Court must accept these arguments as being, in the estimation of the appellee, unanswerable. The failure on the part of the appellee to attempt to refute our contentions justifies our statement herein.

As the matter now stands there are presented two fundamental questions, the first being whether the Commodity Credit Corporation, hereinafter referred to as "the Corporation", was validly and legally created as a means of carrying into execution some power delegated to Congress, and the other question for the Court's consideration is, assuming that the corporation was constitutionally created, do the appellants have the power to levy a *nondiscriminatory* personal property tax upon cotton situated within the geographical and territorial boundaries of the appellant county, and to effect collection thereof by seizing and selling such cotton in conformity with the procedure provided by law, even though that cotton has been pledged to the appellee as security for a loan advanced to the producer?

The appellee, in replying to our opening brief herein, argues that the creation of the corporation can be constitutionally justified under one of three powers, to-wit:

(a) In the exercise of the fiscal power;

(b) In the exercise of the commerce power;

(c) In the exercise of the general welfare power.

It further contends that the appellants have no standing to challenge the constitutionality and operations of the corporation, and that, even though it was unconstitutionally created, its interest in the cotton in question is property of the United States and thus cannot be sold free and clear of its pledgee's lien.

Assuming the constitutionality of its creation the appellee has argued that even though there is no express grant of immunity from the tax in question immunity will be implied from the silence of Congress on the subject.

It relies mainly upon the authority of

New Brunswick v. U. S., 276 U.S. 547,

in support of its contention that the appellants cannot sell the cotton in question free and clear of its pledgee's interest.

We believe that we can best present our answer to the contentions of the appellee herein and be of most assistance to the Court in its determination of the issues presented by answering each contention presented by the appellee in the order in which they are presented and by using the particular titles adopted by the appellee. We will now proceed to quote and answer each of the specific contentions presented by the appellee.

ARGUMENT.

I.

"APPELLANTS HAVE NO STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE CREATION AND OPERATIONS OF THE COMMODITY CREDIT CORPORATION."

Under this title the appellee presents an argument based upon the doctrine of estoppel. We note that the contention was not presented in its "Summary of Argument" (pp. 7-10). Apparently appellee did not deem it of sufficient weight to mention the same therein.

The appellee would attempt to prevent a political subdivision of the State of California from exercising its most essential prerogative (taxation) and from challenging an usurpation of State rights by the Federal Government on the alleged ground that the *State of California* (appellant county is merely a subdivision thereof) has accepted and authorized acceptance of benefits from the appellee.

The cases cited by counsel at pages 12 and 13 might be applicable if the producers or the program committees (the latter are not agencies or instrumentalities of the State of California) who borrowed from appellee or negotiated for loans would attempt to rely upon the unconstitutional creation of the appellee as a ground for their refusal to repay said loans. However, in the instant matter the appellant, who cannot possibly be said to have received any benefits from appellee, is asserting its right to levy and collect a tax on cotton (privately owned) situated within its boundaries, and relies partially on the fact that appellee was

originally unlawfully created and *now is* functioning to effectuate a purpose outside of those delegated to the Federal Government.

The Federal Government could, if appellee is correct, usurp every power reserved to the respective states (and denied to the Federal Government) through the simple expedient of *purchasing* these rights through numerous corporations, purportedly established in the last seven years, which loan money to almost everyone under some alleged power for some alleged purpose. Whenever the constitutionality of these corporations is questioned the Federal Government could plead that no one should be heard to question the constitutionality of its *benefactor*. However, as we understand the nature of our Federalism (see page 31 of appellee's brief for a reference to the suggested concepts of the nature of government), the exercise of any power by Congress must find its justification within one or more of enumerated powers and not in any real or alleged acceptance of benefits given without constitutional authority.

Ergo, if we assume *arguendo* that the appellant accepted some benefits from appellee, nevertheless it may still challenge the invasion of the Federal Government into a field reserved by the Federal Constitution to the respective states.

It would not be amiss to note herein that the provisions of the Agricultural Prorate Act of California relied upon by appellee authorize the Prorate Commission to cooperate with Federal agencies in the formu-

lation and execution of common *marketing* programs and not *common production control programs.* However, even if the appellee purported to assist and control *interstate marketing* of products we fail to see where the passage of the statute referred to would in any way estop the State or its political subdivisions from challenging the unlawful creation of the appellee. The suggestion of cooperation certainly should not be carried to such an extreme that state rights should be surrendered. The same is true of the other statute (Chap. 289, Statutes 1935) relied upon by appellee. *Again we assert that the attempted exercise of a power by Congress must find its justification in the Federal Constitution and not in any action taken by anyone else.*

We also refer to Section 6 of Article XIII of the California Constitution, which provides:

> "The power of taxation shall never be surrendered or suspended by any grant or contract to which the State shall be a party."

If appellee's argument would prevent the appellant from taxing the cotton in question we would have a clear violation of this provision. Obviously the statutes referred to will not be construed so as to lead to their being held unconstitutional.

It is a fundamental principle that state powers which have been reserved to the respective states by the Tenth Amendment cannot be appropriated on the one hand or abdicated on the other.

In *Duke Power Co. v. Greenwood Co.*, 19 Fed. Supp. 932, 954, it is said:

> "The attempted surrender of sovereignty by a state or the shifting of responsibility in return for financial aid cannot be allowed to justify damage to a private citizen. South Carolina cannot lie down and say that it will give power to the federal Congress in return for money and thereby vest regulatory power in the central government which, according to the Constitution, is left where it was originally, in the sovereign state of South Carolina and there alone. This doctrine has been so well stated by Mr. Justice Sutherland in the Carter v. Coal Company case, 298 U.S. 238, 56 S. Ct. 855, 866, 80 L. Ed. 1160, that we refer to it here: 'State powers can neither be appropriated on the one hand nor abdicated on the other.' As this court said in Texas v. White, 7 Wall. 700, 725, 19 L. Ed. 227 (237), 'The preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.' Every journey to a forbidden end begins with the first step; and the danger of such a step by the federal government in the direction of taking over the powers of the states is that the end of the journey may find the states so despoiled of their powers, or—what may amount to the same thing—so relieved of the responsibilities, which possession of the powers necessarily enjoins, as to reduce them to little more than geographical sub-

divisions of the national domain. It is safe to say that if, when the Constitution was under consideration, it had been thought that any such danger lurked behind its plain words, it would never have been ratified.

Such a shifting of responsibility from state to federal shoulders, even if accompanied with the passage of enormous sums of money, is forbidden by our Constitution. We digress to say that it is not only forbidden by the Constitution, but that it will be the beginning of the end, and may be half the journey toward the destruction of the indestructible states making up our indestructible union. The Supreme Court of the United States condemned the purchase of compliance as the mechanics set out in the AAA statute (7 U.S.C.A. Sec. 601 et seq.)—*every court must condemn purchase of compliance seeking to accomplish an unconstitutional result, whether the compliance be by individual citizens as in the Butler case or by responsible state officers as alleged in the case at bar.* * * *'' (Emphasis added.)

(Reversed on another ground in 302 U. S. 485.)

Also see:

Carter v. Coal Company, 298 U.S. 238;
Texas v. White, 7 Wall. 700, 725.

Every exercise of congressional power must find its justification in some authority delegated by the Constitution, and if such authority is lacking, it is immaterial how impotent or unwilling states may be with respect to accomplishing the desired end.

See:

In re American States Public Service Co., 12 Fed. Supp. 667 (modified in 81 Fed. (2d) 721; certiorari denied, 297 U.S. 724);

John Gebelein Inc. v. Milbourne, 12 Fed. Supp. 105;

Commonwealth v. First National Bk. & Tr. Co., 154 A. 379, 303 Pa. 241;

Tatum v. Wheeless, 178 So. 95.

We therefore contend that we can challenge the constitutionality of the creation and operations of the appellee, because as we heretofore established:

(a) The Federal Government cannot appropriate (by purchase or otherwise) and the states cannot abdicate the powers reserved to the states by the Tenth Amendment; (re) Local production of agricultural products.

(b) The record does not support appellee's suggestion that appellant has received any benefits from the appellee;

(c) The state is prevented by Section 6 of Article XIII of its Constitution from surrendering its power of taxation.

II.

"THE COMMODITY CREDIT CORPORATION IS A LAWFULLY CONSTITUTED INSTRUMENTALITY OF THE FEDERAL GOVERNMENT ENGAGED IN THE EXERCISE OF POWERS GRANTED TO CONGRESS UNDER THE CONSTITUTION."

Under this title the appellee attempts to refute our contention that the corporation was unlawfully created and is now operating without constitutional authority. At pages 13 and 14 counsel, in answer to our point that the *original* creation of the appellee was unlawful as well as its purposes and functions, states that we were in error in our belief that the N.I.R.A. has been held unconstitutional. It is true that we inadvertently said that the Act was invalidated rather than Title I of the Act. (*Alabama Power Co. v. Ickes,* 302 U.S. 464, 473.)

However this may be, there cannot be any doubt that the corporation was *originally* unlawfully created because:

(1) Section 2 of Title I of the N.I.R.A., which was the only purported congressional authorization for its creation, fell with Title I;

(*Alabama Power Co.* case, supra);

(2) Section 2 was unconstitutional because it unlawfully delegated *legislative* power to the President;

(*Schechter Corp. v. U. S.,* 295 U.S. 495);

(3) Its function to effectuate the policy and purposes of the AAA of 1933 and the N.I.R.A.

(local production of agricultural products) was not within the power delegated to Congress;

(*U. S. v. Butler,* 297 U.S. 1, and *Schechter* case, supra.)

Counsel apparently admit that we are right in these contentions, for they make no attempt to refute the same.

Their whole argument is directed to the *alleged present* (1) existence, (2) purposes and (3) functions of the appellee. Therefore it now becomes necessary to determine if the present existence, purposes and functions of the appellee are different from the original existence, purpose and functions of the corporation.

The President on October 16, 1933 (acting pursuant to purported power given by Section 2 of N.I.R.A.) allegedly authorized the creation of the appellee by Executive Order No. 6340. (Appendix—Appellant's Opening Brief, pp. i-iv.)

Executive Order No. 6340 provided in part as follows:

"* * * And Whereas, in order, effectively and efficiently, to carry out the provisions of said Acts (AAA of 1933 and N.I.R.A.) it is * * * necessary that a corporation be organized * * * to accomplish the purposes of said Acts. * * *"

"Now, therefore, *under and by virtue of the authority vested in me by the National Industrial Recovery Act* * * *, it is hereby ordered that an

> agency, * * * a corporation, * * * be created * * * to be named the Commodity Credit Corporation." (Emphasis added.)

On the 17th day of October, 1933, appellee filed its certificate of incorporation with the Secretary of State of the State of Delaware.

The third paragraph of this certificate specified, *inter alia,* the following as the purposes of the corporation:

> (a) To effectuate the purposes of the AAA of 1933 and N.I.R.A. *and amendments thereto;*
>
> (c) To cooperate in any plan which provides for reduction in the production of agricultural commodities;
>
> (d) To engage in any activity in connection with the production of agricultural products.

The Third Article of the Certificate of Incorporation has never been amended in any respect material herein.

Section 2 (c) of N.I.R.A. provided that all agencies created thereunder were to cease to exist on June 15, 1935.

We believe that we have heretofore established that the appellee was not constitutionally created. Let us now observe what transpired after October 17, 1933.

On January 31, 1935, Congress purported to extend the life of the appellee to April 1, 1937. (Exhibit B, Appellant's Opening Brief, p. v.)

We note that the *Schechter* and *Butler* cases, supra, had not been decided as of this date.

On January 26, 1937, its life was purportedly extended until June 30, 1939. (Exhibit C in Appendix—Appellant's Opening Brief, p. vi.)

On February 16, 1938 Congress enacted the AAA of 1938 (52 Stat. 31). This act is, contrary to appellee's contention, pertinent herein, because the record discloses that "* * * in the case of cotton on which the Commodity Credit Corporation had made such advances to producers between the 7th day of March, 1938, and the 21st day of June, 1938, the advances were in some instances made before the levy of assessment and in some instances after such levy of assessment. * * *" (Transcript, p. 15.) In other words, the appellee did make loans on the cotton in question *after* February 16, 1938.

Title I of N.I.R.A. was not amended after 1933 and the AAA of 1933 was not amended in any respect material herein.

The appellee contends that the *present* existence of the corporation *is different* from its *original* existence on the theory that the 1935 and 1937 acts, supra, which extended its existence to June, 1939, were, in effect, acts of ratification.

We believe that this argument is unsound because:

(a) Those acts are mere casual references and not acts of ratification;

Ishbrandtsen-Moller Co. v. U. S., 300 U.S. 139, 147, 148;

(b) Congress cannot ratify what it could not originally authorize;

Swayne & Hoyt, Ltd. v. U. S., 300 U.S. 297;
U. S. v. Butler, 297 U.S. 1, 78;

(c) The so-called acts of ratification constitute an unlawful delegation of legislative power to administrative officers and agencies;

Panama Refining Co. v. Ryan, 293 U.S. 388;
Mulford v. Smith, 307 U.S. 38.

(The corporations referred to at pages 14-18 of our opening brief have all been created by acts of Congress which specifically mentioned the policy and standards of the corporation created and also expressly outlined its corporate organization.)

The appellee further contends that the *present purposes* and *functions* of the corporation are different from those purposes and functions which were *originally* given to the corporation.

We do not see how this argument can be sustained when it is noted that:

(a) The articles of incorporation of appellee have never been materially changed;

(b) The acts, whose purposes it was intended to effectuate, have never been materially amended;

(c) The AAA of 1938 is not an amendment of the AAA of 1933 or the N.I.R.A. but rather an amendment of the Soil Conservation and Domestic Allotment Act. The AAA of 1938 had three purposes, to-wit:

(1) Soil Conservation (Secs. 102-104);

(2) Control of local agricultural production through loans made by the appellee upon the condition that production be curtailed (Sec. 302);

(3) Regulation of interstate marketing of agricultural products (Secs. 311-355).

The second purpose referred to above is merely a continuation of its original purpose. (See paragraph 8 of Exhibit E, Appellant's Opening Brief, Appendix, p. xvii.)

When we consider (1) the appellee was created to effectuate the purposes and policies of the AAA of 1933 and the N.I.R.A. which have been declared not to be within the delegated powers of Congress (*Schechter* and *Butler* cases, supra), (2) the provisions of the note and loan agreement (paragraphs 5 and 8) which clearly show the unlawful condition attached to the loan, and (3) the language of Section 302 (C&F) there cannot be any question but that the *present* and *original purposes* and *functions* of the appellee are identical. *The history of the appellee and pertinent congressional acts clearly disclose the continuation of the original unlawful purpose of the corporation.*

The provisions of the note and loan agreement and Section 302 of the AAA of 1938 are not, as contended by appellee, inconsistent. Both of them clearly disclose the intention of the appellee to curtail local production of agricultural commodities. The former by

waiving a deficiency if cooperation is given and the latter by refusing to make a loan unless cooperation is promised. Section 302 (h) would allow a deficiency to be taken if the promise of cooperation was made in bad faith.

At pages 18-20 counsel assert that the existence and operations of the appellee may be justified as *an exercise of the "fiscal powers."* The appellee relies upon the various clauses of Section 8 of Article I (referring to revenue, finance and currency) as the basis for this alleged power. (*Norman v. Baltimore & Ohio R. Co.,* 294 U.S. 240, 303.)

However, the so-called fiscal power does not exist as an incidental and necessary power if the power to which it is allegedly incidental is not delegated to Congress (control of local production).

The appellee would avoid this obvious principle by arguing that the corporation has the power to lend money to producers of cotton and, in order to preserve and protect these loans, it may curtail the production of commodities upon which the loans were made.

This same argument was presented to the United States Supreme Court by counsel in their brief in the *Butler* case, supra. (Butler Brief, pp. 241-262.) However, that Court, deeming that the essential purpose of the act there in question was to control local production of commodities, refused to accept the argument, as must this Court in an identical situation. Here the essential and primary function of the appellee is not to loan money, but rather to invade a

field reserved to the states. It is being used as a medium to acquire control of production of products in the states. In the *Butler* case, supra, counsel asserted that the AAA of 1933 could be justified under the so-called "fiscal powers" to preserve the credit structure of the Nation. However, the Court said that Congress could not, under the pretext of spending to promote the general welfare, invade rights reserved to the respective states. Here, as in the *Butler* case, the so-called fiscal power must be derived from the power to spend for the general welfare. It is also true that here, as in the *Butler* case, the Federal Government cannot, under the pretext of exercising "fiscal powers" derived from the general welfare clause, exercise a power reserved to the states by the Tenth Amendment.

The primary purpose of the appellee is not to loan money, but, as we have heretofore established, to control local productive activity through the medium of loans which are made upon the condition that production is to be curtailed.

It is true that we have not questioned the right of the Federal Government to make loans to producers. But we do not in any way admit by what we have said herein that mere loaning, as such, can be justified under the general welfare clause or any other delegated power. We have not chosen to make that argument herein because we feel that it is obvious that the loaning activities of appellee are merely a means used to effectuate its primary purpose, i. e., to act as a

means of acquiring control of production. We might say, in passing, that if the Federal Government has the power to loan money (without imposing conditions) as an exercise of their power to spend for the purpose of promoting the general welfare, we will be well on our way to a destructible union of destructible states. Heretofore, whenever any corporation (Bank of the United States, Federal Land Banks, War Finance Corporation; p. 18, Appellee's Brief) has been held to be constitutionally created, the decision has been based upon the theory that the lending of money *was merely incidental to some lawfully delegated power* which was being exercised. (*Smith v. Kansas City Title Co.,* 255 U.S. 180, 211; *McCulloch v. Maryland,* 4 Wheat. 316; *Ashwander v. T. V. A.,* 297 U.S. 288.)

The appellee is now asking this Court to hold that the Federal Government can invade a field reserved to the respective states on the theory (not accepted in the *Butler* and *Schechter* cases) that it can spend money in aid of agriculture (by making so-called loans) and thereby promote the general welfare.

At pages 20 to 23 counsel assert that the creation of the appellee may be justified as an exercise *of the commerce power.* The theory adopted by counsel is that production control can be justified on the principle (1) that the plenary power of Congress over commerce gives Congress the power to control such production, or on the principle (2) that its control is incidental to its power to control *interstate marketing.*

To counteract our reliance upon the articles of incorporation of appellee, the declared policy of the AAA of 1933 and the N.I.R.A., the language of note and loan agreement, and the provisions of Section 302 (C and F) of the AAA of 1938, the appellee refers to Section 2 and Section 341 of the latter act. We admit that Sections 2 and 341 of the AAA of 1938 disclose that one of the purposes of that act was to control *interstate marketing* of agricultural products which is within the commerce power granted to Congress (*Mulford v. Smith,* 307 U.S. 38, 47, 48), but that purpose is only one of three purposes for which the AAA of 1938 was enacted, i. e., *Soil Conservation* (Secs. 102-104), *Production Control* (Sec. 302), and the *marketing control* (Secs. 311-355).

Sections 311-314 of the AAA of 1938 were upheld in the *Mulford* case because:

> "* * * The statute does not purport to control production. It sets no limit upon the acreage which may be planted or produced and imposes no penalty for planting and producing of tobacco in excess of the marketing quota. * * *" (p. 47.)

We ask the Court to note the language of Section 302 and of the note and loan agreement to determine if this is also true of the activities of the appellee.

The *Mulford* case, supra, was dealing only with marketing features of the Act, and not with production control provisions found in Section 302. It is obvious that the Court in the *Mulford* case was still of the opinion, as it was in the *Butler* case, that Con-

gress does not have the power to control local productive activity, through the pretext of exercising a power delegated to Congress (general welfare or commerce power).

Also see:

Schechter Corp. v. U. S., 295 U.S. 495.

In *Edwards v. U. S.,* 91 Fed. (2d) 767, this Court merely held that Congress had power to control *interstate marketing* under its plenary power to regulate commerce. The same is true of the following cases:

Troppy v. LaSara Farmers Gin Co., 28 F. Supp. 830;

Wallace v. Hudson-Duncan & Co., 98 Fed. (2d) 985.

Counsel asserts, in an attempt to avoid the compelling force of the *Butler* case, that the provisions of the AAA of 1933 did not purport to regulate commerce. Their reliance on this statement is not apparent when the declared policy of the Act is compared with that of the N.I.R.A. and the AAA of 1938. *There can be no question but that Congress and its advisors believed that the AAA of 1933 was adopted in the exercise of the commerce power. It is true that counsel did not attempt to argue the commerce power, but that was an afterthought forced upon them by the Schechter decision.*

Counsel accuses the appellants of wishful construction when they assert that the *Butler* case held that Congress could not have accomplished its purpose (of controlling production) even if Congress had

purported to act under the commerce clause. We submit that Congress did purport to act under the commerce clause in adopting the AAA of 1933, and the *Schechter* decision forced counsel to abandon the very argument they are presenting herein and to rely on the general welfare clause.

The *Butler* case clearly supports our contention herein that Congress cannot, under the pretext of exercising the commerce power or the power to spend for the general welfare or any other delegated power, control local production of agricultural products, which field has been reserved to the states by the Tenth Amendment.

The *Schechter* and *Mulford* cases, supra, also support our contention.

We cannot see the relevancy of the quotation from the *Edwards* case. (Appellee's Brief, p. 25.) We are not contending that the Act of 1933, of which the AAA of 1933 was merely Title I thereof, could not be amended. Further, we do not contend that Congress cannot control interstate shipping or marketing. We are merely contending that Congress cannot control local production, as attempted herein, either directly or indirectly.

See:

U. S. v. Butler, supra;
Schechter Corp. v. U. S., supra;
Mulford v. Smith, supra.

Every decision heretofore rendered by the United States Supreme Court supports our contention herein.

At page 26 appellee attempts to justify its existence under the so-called "general welfare power" upon the theory that Congress has power to provide for the general welfare by providing appropriate agricultural credit measures and *incidentally* control local production.

At the outset we state that it is our understanding that there is no "general welfare power," but rather that the power to tax is limited by the general welfare clause.

This is the same argument that was presented to and refuted by the Court in the *Butler* case. The Court definitely held that Congress could not, under the pretext of spending for the general welfare, invade a field reserved to the states, i.e., production control.

At page 27 counsel argue that even if the appellee was exercising an unconstitutional function, nevertheless its alleged interest in the cotton is not subject to sale for local taxes, irrespective of and notwithstanding the appellee's alleged interest. They rely upon *Kay v. U. S.,* 303 U.S. 1, 6-7. We have read this case carefully, but have been unable to see that it is in any way pertinent herein. The *implied immunity doctrine,* as we understand it, gives immunity to certain governmental instrumentalities which were *lawfully* created and are exercising *functions* which are in *aid of delegated powers.* This is not true in the instant case.

III.

"THE APPELLEE AND ITS PROPERTY ARE IMMUNE FROM STATE AND LOCAL TAXATION."

At pages 27 to 43 counsel present their answer to our contention that even if the appellee were lawfully created and is functioning to effectuate a delegated power, the appellant had the power to levy and collect the tax in question.

In answering their argument we would first point out the nature of the tax and tax proceedings in question. The tax is one levied on *all* personal property located in Fresno County, California, on the first Monday in March, 1938. It was assessed in the name of "Unknown" *producers* of the cotton in question and not in the name of the appellee or the United States. The appellants did not assess any tax against the appellee or the United States.

Appellee's argument is based upon the assumption that the United States was assessed and will be the taxpayer. However, the most that can be said for appellee herein is that some *alleged* interest of the corporation, a separate and distinct agency of the United States, was taxed, and it will in effect be the taxpayer. We may assume *arguendo* that *if* the United States Government had "property" in the cotton in question, the appellants could not tax that "property." We make this assumption because that problem is not in question herein. (See our argument, pp. 45-62, Opening Brief, which appellee made no attempt to answer.) Even if we assume *arguendo* that the appellee had some "property" in the cotton,

it does not follow that the United States had any "property" therein.

While we believe that the problem presented by the implied immunity doctrine is not before this Court (in view of the nature of the tax and appellee's implied admission of the truth of our argument (pp. 45-62, Opening Brief)), nevertheless, out of an abundance of caution, we will answer the contentions of appellee in regard to that doctrine.

We must, at the outset, admit that Congress has (see pp. 43-44 of our Opening Brief, where we took the contrary position) the power to *expressly* grant tax immunity to lawfully created federal instrumentalities functioning to carry out delegated powers. (*Pittman v. H. O. L. C.*, ... U. S. ....., 60 S. Ct. 16.) *However, that problem is not before this Court because, as stated by appellee (p. 29), Congress "has, however, made no express provision as to the tax status of securities held by the appellee for the repayment of its loan. * * *"*

Therefore the problem presented herein is *(assuming* that some "property interest" of the appellee has been taxed herein) whether a lawfully created Federal agency (a corporation incorporated under the laws of Delaware) is exempt from a non-discriminatory property tax where Congress has not expressly granted that immunity. (Of course we are assuming, *arguendo,* that appellee was lawfully created.)

We believe that counsel for appellee has inadvertently quoted the United States Supreme Court as

holding (p. 28) in *Graves v. O'Keefe,* 306 U.S. 466, 477, that a lawfully created corporation is entitled to whatever immunity is given the United States.

The attention of counsel should be directed to the following language in *Pittman v. H.O.L.C.,* ..... U.S. ....., 60 S. Ct. 15, 18:

> "We *assume* here, *as we assumed in Graves v. New York ex rel. O'Keefe,* 306 U.S. 466, 59 S. Ct. 595, 83 L. Ed. 927, 120 A.L.R. 1466, *that* the creation of the Home Owners' Loan Corporation was a constitutional exercise of the congressional power *and that* the activities of the Corporation through which the national government lawfully acts must be regarded as governmental functions and as entitled to whatever immunity attaches to those functions when performed by the government itself through its departments."

In other words, the Court did not decide the question presented herein in the *O'Keefe* case, supra. However, as we pointed out in our opening brief, the logic and reasoning adopted by the Court in that case strongly indicate that if the question were before them it would have decided the issue in our favor.

Appellee's whole argument is based on the erroneous premise that the *O'Keefe* case held that the United States and all of its lawfully created corporations are entitled to the same immunity. We believe that we have heretofore established that the Court merely *assumed* this and did not decide it. We cannot deny the premise and affirm the conclusion.

We ask the Court to note the following statement found at page 31 of appellee's brief:

> "Payment of a tax, which neither in terms nor in fact marks the Government transaction as the object of the levy, will not bring the operations of the Government to a halt. For this reason the United States as *amicus curiae* urged in *James v. Dravo Contracting Co.,* 302 U.S. 134, that a gross-receipts tax upon the federal contractor should be sustained, even though the full amount of the tax burden would ordinarily be passed on to the Federal Government."

The payment of the tax involved herein does not, in terms or fact, mark the Government transaction as the object of the levy. Therefore the fact that the appellee may be forced to pay the *producer's* tax and seek reimbursement therefor is immaterial.

James v. Dravo Contracting Co., 302 U.S. 134;
Graves v. O'Keefe, supra.

Appellee's contentions in regard to practical considerations, i.e., returns, actions, audits, etc., might possibly be applicable to a tax of a nature different from that involved herein.

The decisions of the United States Supreme Court relied upon by appellee, at pages 33-39, in no wise refute our contention that (1) *in the absence of express exemption* a federal corporation (2) *having purposes other than the government's* is not immune from (3) a *non-discriminatory tax unless* it can show that the tax (4) *will burden the United States.*

In this connection see cases cited at pages 32 to 43, inclusive, of our opening brief.

Also, see:

Buckstaff Bathhouse Co. v. Commr., ... U.S. ....., (12/18/39);

Stone v. Natural Gas Co., 103 Fed. (2d) 544, 549, ... U.S. ....., (12/11/39).

With all due respect to appellee's argument in regard to effect of the silence on the part of Congress, we do not see how they have in any way answered the express statement of the Court in *Graves v. O'Keefe,* supra, at pages 479-480, or the implications in the decision of the Court in *Baltimore Natl. Bank v. State Tax Commission,* 297 U.S. 209.

We ask why should there be any distinction between an individual, a natural person, and a corporation, an artificial person. In the *O'Keefe* case the former was engaged in federal functions, just as we are *assuming* herein that the appellee is engaged in federal functions. We believe that the logic and reasoning of the *O'Keefe, Van Cott* and *Gerhardt* cases are equally applicable to the appellee herein; *ergo,* Congress not having expressly granted immunity, none will be implied.

We have fully presented our argument on this problem at pages 29 to 63 of our opening brief and do not feel that we need repeat the same herein. All we have attempted to do herein is to set forth what we conceive to be the erroneous premise upon which appellee rests its whole argument. Unusual as it may be, counsel for appellants and appellee rely upon practically the same cases to reach contrary conclusions. We believe that those cases, as now interpreted

by the most recent cases, establish the following principles:

(1) Congress has power *expressly* to exempt a lawfully created Federal corporation from all state taxation;

(2) That persons, whether natural or artificial, engaged in carrying out governmental functions are not entitled to the same immunity from state taxation as that adhering to the national government;

(3) That persons, whether natural or artificial, engaged in carrying out governmental functions are not immune from state taxation unless Congress has expressly granted them exemption or, when Congress is silent, the imposition of the particular tax in question will unlawfully burden the United States.

The record in the instant matter will not support a claim that the particular tax in question burdens, in any way, the United States.

We therefore contend that the appellants had the right to levy and collect the tax involved herein without regard to the alleged interest of the appellee in the cotton in question.

IV.

"THIS CASE IS CONTROLLED BY NEW BRUNSWICK v. UNITED STATES."

In *New Brunswick v. United States,* 276 U.S. 547, the Court correctly decided that the City of New

Brunswick had no right to sell land free and clear of a lien reserved to the United States Housing Corporation by Congress, to collect delinquent taxes. Appellee deems that this case is controlling herein.

In answer to appellee's statement (p. 46) to the effect that we did not discuss or mention the *New Brunswick* case, we wish to say that the reason we did not mention that case in our opening brief was, apparently, the same that prompted appellee not to discuss or mention the other case relied upon by the trial Court, *Webster v. Board of Regents,* 163 Cal. 705 (Transcript, p. 22); the reason being obvious—neither case is pertinent to the facts and issues presented in the instant matter.

The *New Brunswick* case is not pertinent herein because:

(1) The United States Housing Corporation was *lawfully created* by *Congress* to carry out governmental functions *and no others;*

Clallam Co. v. United States, 263 U.S. 341;

(2) The Housing Corporation had a ninety per cent (90%) property interest in the land there taxed;

(3) Congress had, in effect, granted an immunity to the property owned by the corporation because it "reserved a first lien";

(4) The United States Government purchased the land there in question with Federal funds and thus had title, while in the instant case any property interest held by anyone other than the

producers herein must be said to be held by the appellee, an agency distinct and separate from the United States;

(5) The *United States* originally acquired legal title to the land there in question and at all times pertinent therein retained legal title to 90% of the property.

Thompson v. Kentucky, 209 U.S. 340, 348, cited by appellee, merely refers to the well-established principle that Federal taxes are generally entitled to priority over State taxes. The relevancy of this case is not apparent to us.

V.

"OTHER POINTS."

At pages 47 to 49 appellee argues that Section 25 of the Warehouse Receipts Act (General Laws of California, 1937, Act 9059) prevents the appellants from seizing and selling the cotton in question until appellee surrenders its warehouse receipts.

The levying of a tax and the seizure of property to effect collection of the delinquent taxes is not within the purview of Section 25 of that Act. It merely refers to attachments, garnishments and executions. Certainly the state and local taxing bodies do not have to seek out holders of warehouse receipts to effect collection of their taxes. The mere fact that appellee would rely upon such a contention indicates the weakness of appellee's position herein.

CONCLUSION.

We have shown that appellee is not a duly constituted agency of the United States engaged in the exercise of powers delegated to Congress; that in the silence of Congress immunity cannot be implied where, as here, the imposition of the tax will not unlawfully burden the United States; and that the *New Brunswick* case, supra, does not require the appellants to sell the cotton in question subject to the pledgee's lien allegedly acquired by appellee.

We respectfully submit that the judgment of the Court below should be reversed.

Dated, Fresno, California,
January 10, 1940.

Respectfully submitted,

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